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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 702

FLOYD & BEASLEY TRANSFER CO., INC., *Appellant*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al., Appellees*

On Appeal From the United States District Court for the Northern District of Alabama

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Floyd & Beasley Transfer Co., Inc. (F & B) appeals from the judgment of the United States District Court for the Northern District of Alabama, entered June 24, 1966, dismissing a complaint to set aside orders of the Interstate Commerce Commission. F & B submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS

The per curiam opinion of the three-judge District Court, entered on June 24, 1966, is reported at 256 F. Supp. 23. The opinion and judgment of the District Court are printed as Appendix A. The report and recommended order of the Examiner for the Interstate Commerce Commission, served September 28, 1964, is printed as Appendix B. The report of the Interstate Commerce Commission, Division 1, decided March 11, 1965, is reported at 98 M.C.C. 304 and printed as Appendix C. The unreported order of the Commission, Division 1 acting as an Appellate Division, dated March 31, 1965, reopening the proceeding on its own motion for reconsideration on the existing record, is printed as Appendix D. The unreported Order of the Commission, Division 1 Acting as Appellate Division, dated July 14, 1965, denying the petition of F & B to reopen the proceeding for further hearing, is printed as Appendix E. The report of the Commission, Division 1, Acting as an Appellate Division, dated July 14, 1965, is reported at 99 M.C.C. 258, and printed as Appendix F. The unreported order of the Commission, Division 1, Acting as an Appellate Division, dated November 12, 1965, denying further hearing and reconsideration, is printed as Appendix G.

JURISDICTION

This action was brought under 28 U.S.C. Sections 1336 and 2321-2325 to set aside orders of the Commission entered under Section 207(a) of the Interstate Commerce Act, 49 U.S.C. Section 307(a) in accord with procedure prescribed in Section 17(5-10) of the Interstate Commerce Act 49 U.S.C. Section 17(5-10). Twenty-six shippers intervened as parties plaintiff-

Parker Fertilizer Company, of Sylacauga, Alabama, Sylacauga Auto Parts Company, of Sylacauga, Alabama, Campbell Auto Parts Company, of Childersburg, Alabama, Marble City Broadcasting Company, Inc. (WMLS Radio) of Sylacauga, Alabama, Joe Dark, doing business as Modern Cleaners and Dark's Dairy, of Sylacauga, Alabama, Avondale Mills, Inc., of Sylacauga, Alabama, Sylacauga Motor Car Company, of Sylacauga, Alabama, Alabama Marble Company, Division of Georgia Marble Company, of Sylacauga, Alabama, Coosa Motor Company, of Childersburg, Alabama, Talledega Hardware Company, of Talladega, Alabama, Danville Yarn Mills, of Bon Aire, Alabama, Cooley Motor Company, of Talladega, Alabama, Talladega Machinery and Supply Company and Talladega Foundry and Machine Company, both of Talledega, Alabama, Sarvis Hardware Company, of Sylacauga, Alabama, L. M. Payne, Jr., doing business as Payne L. P. Gas Company and Payne Gulf Oil Products, both of Talladega, Alabama, Southern Alloy Corporation, of Sylacauga, Alabama, Dixie Color Printing Company, of Sylacauga, Alabama, Hill Radio & TV Company, of Sylacauga, Alabama, Plantation Patterns, Inc., of Birmingham, Alabama, The Okonite Company, Division of Kennecotte Copper Corporation, of Birmingham, Alabama, Michael Supply Company, of Talladega, Alabama, Conner's, of Talladega, Alabama, Automotive Supply Company, of Sylacauga, Alabama, C. E. Nivens Truck & Tractor Company, of Sylacauga, Alabama, and Solar Cast, Inc. of Sylacauga, Alabama.

The United States and the Commission answered. Malone Freight Lines, Inc., Bowman Transportation Inc., Overnite Transportation Co., Roadway Express, Inc., Cotton States Motor Lines, Inc., dba

R. C. Motor Lines of Georgia, Dixie Highway Express, Inc., Baggett Transportation Co., Alabama Highway Express, United Motor Freight Terminal, Inc., Georgia Highway Express, Inc., B. C. Truck Lines, Inc., Akers Motor Lines, Inc., Parrish Dray Lines, Inc., Dixie-Ohio Express, Inc., Anniston-Talladega Motor Express, Inc., Eagle Motor Lines, Inc., G. F. A. Transportation Co., Inc., Terminal Transport Co., Johnson Freight Lines Company, Ryder Truck Lines, Dixie Highway Express Inc., McLean Trucking Co., Nilson Motor Express Inc., R. C. A. Truck Lines Inc., R. C. Motor Lines, Inc., and Youngblood Truck Lines Inc. intervened as parties defendant.

The judgment of the District Court was entered June 24, 1966. Notice of appeal was filed August 22, 1966. The Supreme Court has jurisdiction under 28 U.S.C. Sections 1253 and 2101(b) to review the judgment below on direct appeal. This jurisdiction is sustained by decisions in *Chicago & North Western Railway Company* v. *Chicago, Milwaukee, St. Paul & Pacific Railway Company,* 380 U.S. 448 (1965), and *Southern Railway Company* v. *North Carolina,* 376 U.S. 93 (1964).

STATUTES INVOLVED

Section 17(5-10) and Section 207(a) of the Interstate Commerce Act, 49 U.S.C. Section 17 (5-10) and 307(a), is printed as Appendix H.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

(A) May the Interstate Commerce Commission reverse an examiner after the examiner's detailed finding of fact had been adopted by the Commission without specifying in detail the error of the examiner?

(B) May the Interstate Commerce Commission reverse an examiner on his finding of fact when the examiner viewed the witnesses and heard their testimony and the Interstate Commerce Commission did not?

(C) May the Interstate Commerce Commission, in the light of the mandate of the National Transportation Policy refuse to grant a petition for further hearing which was supported by affidavit showing abandonment of service by opposing carrier at the points applied for?

(D) May the Interstate Commerce Commission fail and refuse to consider evidence of record to the effect that the service proposed would not materially or adversely affect the existing motor carriers but would enable the plaintiff to serve the public more efficiently and economically?

STATEMENT OF THE CASE

F & B is a relatively small motor common carrier which has its home terminal in Sycamore, Alabama, adjacent to Sylacauga, Alabama, and in the immediate vicinity of Talladega and Childersburg, Alabama.

F & B is authorized, as pertinent here, to transport general commodities with certain exceptions which are not relevant here, *from* Chattanooga, Tennessee, Atlanta, Georgia, and points in South Carolina to Sycamore and Sylacauga; (2) textile products and textile machinery *from* Atlanta, Chattanooga and points in South Carolina to Childersburg and Talladega; (3) textile products *from* the four points to Atlanta, Chattanooga and points in South Carolina. It serves daily most of the textile facilities at the four points. It

serves virtually all businesses in Sylacauga and Sycamore that secure shipments from or through the important gateway points of Atlanta, Chattanooga or Greenville, South Carolina.

Prior to the filing of this application, Transcon Lines, Ryder Truck Lines, Baggett Transportation Company, Inc. and Georgia Highway Express, Inc., provided direct LTL (less truckload) service between one or more of the four points of Sylacauga, Sycamore, Talladega and Childersburg, on the one hand, and, on the other, Atlanta, Chattanooga, and points in South Carolina. In 1962, Transcon Lines discontinued service within this area (TR. 1180-1181)* When Transcon Lines abandoned service to the four points in 1962, F & B filed an application for temporary authority to serve them. This temporary authority was denied. It also filed, on October 10, 1962, the application which is before this honorable court for review. The application was heard October 7-11 and 15-18, 1963, before a hearing examiner of the Interstate Commerce Commission. Thirty-six shippers, of which four were from Birmingham, one Sycamore, fifteen Sylacauga, eight Childersburg, and eight Talladega, together with three connecting motor common carriers, supported the application. Twenty-one motor common carriers actively opposed the application.

The hearing examiner, by report and recommended order served September 28, 1963, and after meticulously detailing the testimony of each of the supporting shippers and each of the opposing motor carriers,

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* Reference to the record will be indicated by the following abbreviations: TR-Transcript hearing before the Commission; EX.-Exhibits introduced at the hearing.

recommended that the applicant be authorized to operate (1) from Sycamore and Sylacauga to Chattanooga, Tennessee, Atlanta, Georgia and points in South Carolina; (2) between Sylacauga and Sycamore, on the one hand, and, on the other, Anniston, Alabama; (3) between Childersburg and Talladega, Alabama on the one hand, and on the other, Anniston, Alabama, Chattanooga, Tennessee, and Atlanta, Georgia, and points in South Carolina—all restricted against tacking with any existing authority to provide a through service (a) between Chattanooga, Tennessee and Atlanta, Georgia; (b) between Birmingham, Alabama and Atlanta, Georgia; (c) between Birmingham, Alabama, and Chattanooga, Tennessee (Appendix B, p. 20a).

F & B excepted to the proposed tacking restriction. The protestants excepted to the recommended grant of authority.

The Commission, Division 1, denied the application by report an order dated March 11, 1965 (98 M.C.C. 304; Appendix C). On April 13, 1965, however, the Commission on its own motion reopened the proceeding for reconsideration on the existing record because of an obvious error on the part of the Commission (Appendix D).

On June 8, 1965, F & B filed a Petition for Further Hearing. F & B alleged in part that protestant Ryder Truck Lines had discontinued service between the involved points resulting in a critical loss of transportation service to these communities. The petition was supported by the affidavits of nine shippers. It is to be recalled that this application was filed after Transcon lines had previously abandoned service to these points.

On July 14, 1965, the Commission, Division 1, acting as an Appellate Division, entered an order denying petition for further hearing on the grounds that no sufficient cause had been shown notwithstanding the fact that probably the major protesting carrier, viz., Ryder Truck Lines, had discontinued service (Appendix E).

On the same date, the Commission, Division 1, acting as an Appellate Division, issued its report and order on reconsideration denying the application (99 M.C.C. 258; Appendix F). In essence, the Commission held that (1) the shippers failed to establish a need for the proposed service; (2) no material inadequacy was shown in the existing service; and (3) the proposed service would not meet the transportation needs of the existing shippers.

F & B petitioned the Commission for reconsideration. By order on November 12, 1965, the Commission, Division 1, Acting as an Appellate Division, denied the petition (Appendix G).

F & B filed the complaint in the court below on February 24, 1966 to set aside and enjoin the Commission's orders.

On June 24, 1966, a District Court entered an opinion and judgment dismissing the complaint and affirming the Commission's orders. The District Court found that the orders were supported by substantial evidence and that the function of the court on review was not to resolve relevant factual issues entrusted to the expertise of the Commission. (256 F. Supp. 23, Appendix A)

THE QUESTIONS ARE SUBSTANTIAL

The following questions are presented by this appeal:

May the Interstate Commerce Commission reverse an examiner after the examiner's detailed finding of fact had been adopted by the Commission without specifying in detail the error of the examiner?

May the Interstate Commerce Commission reverse an examiner on his finding of fact when the examiner viewed the witnesses and heard their testimony and the Interstate Commerce Commission did not?

May the Interstate Commerce Commission, in the light of the mandate of the National Transportation Policy refuse to grant a petition for further hearing which was supported by affidavit showing abandonment of service by opposing carrier at the points applied for?

May the Interstate Commerce Commission fail and refuse to consider evidence of record to the effect that the service proposed would not materially or adversely affect the existing motor carriers but would enable the plaintiff to serve the public more efficiently and economically?

These questions are important to carriers and to shippers. They have never been decided by this Court although this Court has established certain principles in connection with other administrative agencies which bear on the weight to be given an examiner's recommended report.

The decision in this case, as it now stands, nullifies the effect of the testimony of witnesses who have testi-

fied orally as to their needs for transportation service and, in addition, removes all reason from appellate procedure within the Interstate Commerce Commission. The record in this case reflects that F & B effectively has been denied the right of appeal by the procedure of review within the Commission, and, within that procedure, the findings of fact of the examiner have been arbitrarily disregarded, ignored or misconstrued without explanation.

The National Transportation Policy declares in part that the Interstate Commerce Act should be so administered as to

> "promote safe, adequate, economical, and efficient service and foster sound economic conditions of transportation and among the several carriers;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of commerce of the United States, of the coastal service, and of the National Defense." (Preface to Title 49, USC, Chapter 1)

Pursuant to the mandate of the National Transportation Policy, after Transcon Lines discontinued service an application was filed by F & B to serve four small towns in the State of Alabama under the provisions of Title 49, U.S.C. 307(a) (Appendix H, page 94a). The examiner took the oral testimony of the 36 shipper witnesses and the three connecting line carriers in support of this application. He observed the demeanor of those witnesses, minutely detailed their testimony in his report and recommended order and recommended the grant of authority. (Appendix B, page 6a)

The Commission, Division 1, Acting as an Appellate Division, found:

> "We find the examiner's statement of facts to be accurate in all material respects, and, except as modified here, we adopt as our own. Certain facts will be restated to the extent necessary for clarity of discussion". (Appendix F, p. 82a)

Thus the dominant portion of the above quotation with which we are concerned is "except as modified herein".

Division 1, Acting as an Appellate Division, then found without pointing out any deficiencies in the examiner's report:

> "In summary, we believe the record as a whole shows no material inadequacy in the existing single line and joint line motor services available both from opposing carriers who have been used and have provided reasonably adequate service as well as from those carriers whose services have not been tried" (99 M.C.C. 266, Appendix F, p. 91a).

This finding is flatly erroneous. The record shows without question that protestants failed to provide service between most of the points involved. The remaining points received inadequate service. For instance, no protestant provides direct LTL service between Sycamore, Sylacauga, Childersburg, and Talledega on the one hand, and, on the other, points in South Carolina (TR 338-339, 400, 427-437, 513, 476, 483, 569-572, 633-634, 690-691, 696, 727, 749, 754-755, and 996). Ten protestants have authority to serve South Carolina but either do not or cannot serve the four points on LTL traffic. Only Bowman Transportation Company offered evidence of interline serv-

ice only. Ryder Truck Lines, during the hearing, served between Sylacauga and Childersburg, on the one hand, and, on the other points in South Carolina but Ryder abandoned service (Reply of Akers, et al. to applicant's petition for further hearing, p. 7, filed June 4, 1965). This fact was incorporated into the record (Order of Commission denying petition for further hearing entered July 14, 1965; Appendix E). However, Division 1 Acting as an Appellate Division, blindly ignored the abandonment by Ryder and repeatedly refers to the adequate service Ryder provides on LTL traffic (99 M.C.C. at 262-263, Appendix F, pp. 85a-87a).

No protestant provides LTL service from Sycamore, Alabama, to Atlanta, Georgia, or Chattanooga (TR. 351-352). No protestant provides direct LTL service between Talladega, Alabama, and Chattanooga, Tennessee (TR. 634, 638, 648, and 896). Baggett Transportation Company only provides service between Sylacauga, Alabama on the one hand, and, on the other, Atlanta, Georgia, and Chattanooga, Tennessee, but virtually all the Sylacauga shippers find Baggett Service grossly inefficient (TR. 184, 340-342, 381-382, 481-483, 655, 752, 1008-1010, 1032). These citations are but examples. Upon analysis it appears that Division 1, Acting as an Appellate Division, attempts to evade the evidence of lack of LTL's Service by stating the *conclusion* that many of the shippers are "primarily interested in the outbound transportation of volume rather than less than truckload shipments" (99 M.C.C. at 265, Appendix F, p. 90a). From this conclusion Division 1 moves easily to the next conclusion that shippers "have not tried or are unaware of the variety of services now available from the regu-

lar route as well as irregular route of protesting carriers" (99 M.C.C. at 265-266, Appendix F, p. 90a). However, only two of the thirty-two reporting shippers at the four points were "primarily interested" in truckload service.

The examiner, after hearing the testimony of these witnesses, found "many of the supporting shippers have shown that they require overnight service to and from the points sought in the application." (Appendix B, p. 18a) This finding was supported by specific documentation in the record (See Appendix A to the examiner's report Appendix B). Division 1, Acting as an Appellate Division, after reading the record, made the blanket finding that the shippers do not need overnight service on LTL traffic (99 M.C.C. at 265 Appendix F). No explanation for such reversal is given.

Although the evidence was not rebutted, Division 1, Acting as an Appellate Division, never refers to the actual experience of these shippers routing their shipments by F & B to Sycamore in order to obtain overnight service. Division 1 also ignores the testimony that overnight service is required by these shippers to operate their mills and factories, to sell their products, and to obtain service for their customers. It is arbitrary to the extreme to substitute judgment in the face of the only "evidence". If the reasons given by these shippers for overnight service have some infirmity, neither the parties nor the court can ever know in view of the silence of Division 1 on this point. We are left to speculate upon what the Commission did in a secret conference. The Commission has a legal duty to demonstrate reasons for its conclusions.

In *Saginaw Broadcasting Company* v. *Federal Communications Commission,* 96 F. 2d 554, 561 (BC CIR), cert. denied 305 U.S. 613 (1938), the Court noted:

> "These decisions showed that a reviewing court cannot properly exercise its functions upon findings of ultimate fact alone but must require also findings of basic facts which represent the determination of the administrative body as to the meaning of the evidence, and from which the ultimate facts flow."

The case of *Dixie Highway Express, Inc. et al.* v. *U. S. et al.,* 242 F. Supp. 1016 (DC-Miss.), is almost a mirror image of the instant case. In that case the joint board *denied* the application after making specific finding and reversed without reason. Also in the *Dixie* case two new carriers had been granted authority whose service had not been tried. In this case service had been abandoned by one of the dominant protestants to points involved.

In the *Dixie* case the court stated:

> "While it is recognized that there must necessarily be some limitations upon specifics in a finding of facts which influence or control Commission action, would appear irrefragable that in view of the Commission's adoption generally of the board's findings, that the Commission was obliged to state with more than ordinary specificity any contrary finding of facts available to it in this record to influence its decision. We are not favored with any such findings in this record."

It was also held that:

> "While this court has its statutory limitations upon the scope and range to review in cases of this kind (5 USCA Sec. 1009(e)), still the Inter-

state Commerce Commission does not possess any carte blanche authority to disregard positive, undenied, credible testimony and binding judicial opinions and applicable legal presidence in these cases. . . ."

"The commission has dealt with this record throughout its report in vague and nebulous terms. Without making any finding of facts from the record to support its conclusions, it has dealt with this problem in its entirety and genralities without favoring us with any facts to be found in this record to support the conclusion which they reached. Although the Commission expressly adopted the board's statements of fact as being correct in all material respects; and without making any specific findings by the commission which are supported by this record, the commission has nevertheless proceeded to disapprove the sound conclusions based upon such findings to the contrary."

The above is equally applicable to this case, however, the error is even more compounded by the fact that the examiner based his finding of fact not only upon what the witnesses testified but also upon his observation of the demeanor of that witness in giving that testimony. This court has recognized the importance of the findings of fact by the examiner after viewing the witnesses in the case of *Universal Camera Corporation* v. *N.L.R.B.*, 340 U.S. 474. At page 494 the court quoted from the legislative history of the Administrative Procedure Act as follows:

"The conclusion is confirmed by the indications and legislative history that enhancement of the status and function of the trial examiner was one of the important purposes of the movement for administrative reform.

"This aim was set forth by the Attorney General's Committee on administrative procedure:

"'In general the relationship upon appeal between the hearing commissioner and the agency sought to a considerable extent to be that of trial court to Appellate Court. Conclusions, interpretations, law, and policy should, of course, be opened to full review. On the other hand, on matters which the hearing commissioner, having heard the evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown.'"

The court went on to state that at page 496:

"We do not require that the examiner's findings be given more weight than reason and in the light of judicial experience they deserve. The 'substantial evidence' standard is not modified in any way when the board and its examiner disagree."

The hearing examiner was obviously an important portion of the procedure provided for by the Interstate Commerce Act. The examiner was given all of the powers that any of the commissioners or boards were given under the act (Appendix H, p. 97a).

Division 1, Acting as an Appellate Division, denied a petition of F & B for further hearing in which (1) affidavits were given to the effect that Ryder had discontinued service, (2) a letter from Dixie Highway Express, Inc. withdrawing its opposition and stating that it felt the authority should be granted F & B and (3) the affidavit of the shippers to the effect that Alabama Highway Express had not instituted the service that they "proposed" at the time of the hearing.

There is no question but that the discontinuance of service by Ryder Truck Lines constituted a serious change in the motor carrier service within these small communities, especially when Division 1, Acting as an Appellate Division, repeatedly refers to the adequate service Ryder provides shippers on LTL traffic (99 M.C.C. at 262-263, Appendix F, pp. 85a-87a). Division 1 also refers to the service offered by Dixie Highway Express (99 M.C.C. at 262, Appendix F, p. 88a). In a letter to the secretary of the Commission dated March 23, 1965, Jack Cole withdrew the protest of Dixie Highway and stated: "we feel the shippers need F & B service".

Obviously service, which had been performed by carriers which has since been abandoned, should not be considered in a denial.

Nor should that abandonment of service be ignored on a petition for rehearing.

F & B explained all the above in detail in its petition for further hearing. The commission found, however, that the petition presented "no sufficient or proper cause—for reopening the proceeding" (Appendix E, p. 79a).

The Commission has broad discretion to grant or deny a petition for further hearing; however, the realm of this discretion is not absolute. This Honorable Court stated in the case of *Atchison T. and S. F. R. Co.* v. *United States,* 284 U.S. 258, at page 262:

> "In the instant proceeding, the hearing recorded related to conditions which had been radically changed, and a hearing, suitably requested, which would have permitted the presentation of evidence relating to existing conditions, was denied. We

> think that this action was not within the permitted range of the commission's discretion, but was a denial of right".

F & B is a small carrier but, as acknowledged by the protestants in this case, handled the majority of the traffic to and from these four small towns. The examiner found, and that finding was adopted by Division 1 of the Commission, that a grant of the application "would not cause undue harm to the existing service." (Appendix B, p. 18a) and further, that:

> "Under applicant's present operating authority, shippers who receive freight from applicant almost daily and at which points applicant's vehicles are available almost daily for outbound movements, nevertheless may not use applicant for outbound traffic. This situation is uneconomical and inconvenient to shippers, since they must arrange their traffic so that applicant can load some of it and then arrange for another motor carrier to load other commodities possibly moving in the same direction . . . the service here proposed by applicant will result in service devoted particularly to the four points dedicated to the handling of less truckload traffic by a carrier already in the field, and one able to meet the requirements of the local shippers." (App. B, pp. 17a-18a)

Division 1 obviously ignored the evidence in this aspect and the courts and the Commission have recognized that a superior transportation service, together with the finding of no material adverse effect upon protestants' existing operations, quite properly justify finding of public convenience and necessity. *Roadway Express, Inc. Extension—Birmingham,* 82 M.C.C. 689.

The interpretation and application of the National Transportation Policy and Section 207(a) as adopted by the Commission and sanctioned by the lower court in this case, are not consistent with the statutory objectives, nor have the procedures followed by the Commission and sanctioned by the court below in this case been consistent with the provisions of the Interstate Commerce Act.

For these reasons, the questions presented by this appeal are substantial and are of such public importance as to require plenary consideration.

Respectfully submitted,

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